Nos. 40 and 41

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, *Petitioner,*
No. *vs.* 40
THE TEXAS COMPANY, *Respondent.*

OKLAHOMA TAX COMMISSION, *Petitioner,*
No. *vs.* 41
MAGNOLIA PETROLEUM COMPANY, *Respondent.*

REJOINDER BRIEF OF RESPONDENTS, AND MOTION FOR PERMISSION TO FILE SAME.

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December, 1948.

INDEX.

TABLE OF CASES.

TABLE OF CASES—CONTINUED.

TEXT BOOKS AND STATUTES CITED.

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REJOINDER BRIEF OF RESPONDENTS.

In petitioner's reply brief in these two cases, filed subsequent to the hearing thereof, and in the closing argument on behalf of petitioner, certain new matters or contentions were injected into the cases. Respondents have been afforded no opportunity to answer these newly advanced claims, and are therefore now requesting permission to file the following rejoinder brief. Respondents believe, and therefore so state, that this will clarify the position of the parties under these new claims, and will prove of some assistance to the Court.

I.

That respondents are Federal instrumentalities is established both by the factual situation and by the unbroken line of decisions of this Court.

Petitioner apparently conceded in its original brief that respondents were Federal instrumentalities, saying on page 41:

> "We have proceeded so far on the theory that the appellees are federal instrumentalities where the lands of restricted Indians are involved. We have so proceeded because of the line of decisions of this Court where it has so held."

This is followed by the statement that petitioner does not contend that the decision in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, wrought any change with respect to respondents occupying the position of Federal instrumentalities.

Now, however, petitioner appears to recognize that if respondents are Federal instrumentalities in fact, then the law is clear that a state cannot impose a tax upon their functioning as such. Accordingly, petitioner seems to have shifted its position and to place chief reliance upon a claim that respondents are not Federal instrumentalities.

Rules and Regulations of the Corporation Commission of Oklahoma, in furtherance of its conservation program to prevent waste cannot deprive respondents of their status as Federal instrumentalities.

Petitioner now comes forward for the first time with copies of certain purported orders of the Corporation Commission of Oklahoma, dated July 16, *1917*, and January 5, *1922*, (long prior to the execution of all of The Texas Company's and some of Magnolia Petroleum Company's De-

partmental oil and gas leases involved in these two cases.) attached to its Reply Brief, setting out certain rules and regulations *generally applicable to conserve oil and gas and to prevent waste.* This forms no part of the record of these two cases, and no contention was made thereon in the court below. Now, however, petitioner seems to contend that it has a bearing upon the question of whether respondents are Federal instrumentalities.

No mention was made of these Corporation Commission orders, either in petitioner's original brief or in its opening argument, and it was only in the closing argument and in the reply brief that the claim was made that the Corporation Commission had certain rules and regulations applicable to drilling and production of oil, and that either one or both respondents had participated in certain well-spacing programs. From this it was contended that in some unexplained way this resulted in the respondents losing their status as Federal instrumentalities, and accordingly their tax immunity.

It is impossible to see how the conservation statutes of Oklahoma, and their administration by the Corporation Commission of that state could have any influence upon or play any part in the present litigation. Certainly, Oklahoma has its conservation statutes, as have other major oil-producing states. But these statutes, and the rules and regulations promulgated pursuant thereto, have never been held enforceable where in conflict with the rules and regulations of the Secretary of the Interior, in so far as applicable to Indian lands the title to which was held by the United States for restricted Indians, unless the Secretary of the Interior (or the appropriate Government representative such as the Supervisor of Geological Survey) consented to and approved same. In other words, the rules and regula-

tions of the Oklahoma Corporation Commission have not been interpreted as superseding or ousting the powers conferred by the Congress on the Secretary of the Interior and the Geological Survey.

The Oklahoma law for the conservation of oil and gas is found in Chapter 3 of Title 52, O. S. A., and is purely a police act intended to prevent waste. Such is declared to be the purpose of well-spacing and drilling units (52-87, O. S. A.) The oil and gas lessee who complies with the orders of the Corporation Commission issued to prevent waste in no sense becomes an agency or instrumentality of the state, and there is no analogy between this situation and that of a Departmental oil and gas lessee. The application of the conservation laws of the state in order to prevent waste does not mean that the lessee there is acting for and on behalf of the state. It is not the governmental function of the state to produce the oil, but only to prevent waste.

The situation in the case of the Departmental lessee is entirely different. There, the Government in the administration of the lands of its Indian wards is charged with a duty and obligation. If the lands are valuable for oil and gas purposes, then it becomes its duty to see to it that the lands are properly developed and operated. This is a governmental function, and has been so held for many years. When the Government performs that function through a lessee, the lessee then becomes a governmental instrumentality.

If the Secretary of the Interior or the Geological Survey cooperates with the state in its conservation program, and approves certain orders of the Corporation Commission where not inconsistent with governmental rules and regulations, that does not alter the essential relationship existing between the United States and its oil and gas lessee

under a restricted Indian lease. The lessee under such a lease would have no right or power to step out from under its duties and obligation as an instrumentality of the Government, even assuming that it sought to do so. As long as lessee remains the owner and operator of such a lease, and as long as the land remains restricted, the relationship is inviolable. Even the sale and assignment of the lease is ineffective until approved by the Secretary of the Interior. Nor has the state or any of its departments any right or power to disrupt that relationship. Petitioner has been unable to produce any authority to the contrary.

We believe that it is the policy of our National Government to cooperate with the several states in furtherance of their conservation programs. But the plenary powers of the Government when dealing with its Indian wards must not be overlooked. In this connection the Act of August 4, 1947, is significant. That Act dealt with members of the Five Civilized Tribes, but it shows the legislative interpretation placed by Congress upon the power of the Government, either to cooperate with, or to refuse to cooperate with the state in carrying out its oil and gas conservation program on restricted Indian lands. We quote from the Act as follows:

> "Sec. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided,* That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative."

(The above section appears as Sec. 11 in Public Laws 336, Act of August 4, 1947, at page 728 of U. S. Code Congressional Service, 80th Congress, First Session, 1947, and said section appears on page 731 of such service.)

That a State cannot encroach upon or interfere with the exercise by the Congress of its plenary powers over Indian affairs is well established.

The plenary power of Congress over Indian affairs is so firmly established by the decisions that we did not anticipate that any contention would be made in opposition thereto, particularly since no such question was raised in the petitioner's original brief. Since, however, petitioner in its reply brief now asserts that the conservation rules and regulations of the Oklahoma Corporation Commission have some effect upon the status of respondents as instrumentalities of the Government, a brief reference is in order to a few of the cases holding that the state cannot interfere with the absolute control which the Government has over the affairs of its Indian wards.

This power of Congress over Indian affairs has been recognized for many years. In *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, it is said:

> "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

Whether such control of Congress is regarded as supplanting the former treaty-making system (*U. S. v. Kagama, supra*), or as stemming from the power to regulate commerce with the Indian tribes, pursuant to Art. I, Sec. 8 of the Constitution (*Ex parte Webb*, 225 U. S. 663, 56 L. ed. 1248), or as arising from an inherent power of Congress

historically, and by virtue of "long-continued legislative and executive usage and an unbroken current of judicial decisions" (*United States* v. *Sandoval*, 231 U. S. 28, at p. 46, 58 L. ed. 107, at p. 114), this plenary power of Congress is beyond question.

In *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, which dealt with affairs of some of the very Indian tribes as involved in the present cases (*Kiowas* and *Apaches*), the Court said:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

And in *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 55 L. ed. 738, this Court said:

> "We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such."

From the very beginning of statehood Oklahoma has recognized the plenary power of Congress over Indian affairs within its borders. In the Enabling Act, pursuant to which Oklahoma was admitted to the Union (34 Stats. at L. 267, Chap. 3335), it is provided in Section 1 of the Act:

> "That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or

other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

In response to this provision, Art. I, Sec. 3, of the Oklahoma Constitution provides, among other things, that:

> "The people inhabiting the State do * * * disclaim all right and title in and to * * * all lands lying within said limits owned or held by any Indian, tribe, or nation; * * *"

The said provision of the Enabling Act was considered in *Ex parte Webb, supra,* it being held that the reservation of Congress to legislate respecting Indians was within its constitutional power.

That there is no effort or desire on the part of the State of Oklahoma to interfere with Congress in the exercise of its plenary powers, but that it acknowledges same as being paramount (whether to the rules and regulations of its Corporation Commission, or otherwise) is shown by the decisions of its highest court. In addition to the decisions in the instant cases and to the other cases which we have cited, see *Adams* v. *Freeman,* 50 Pac. 135.

Petitioner in the reply brief suggests that citizenship has been conferred upon the Indians, and argues that this affects the result. But this Court has held that, unless so provided, the power of Congress with respect to Indians does not cease when the Indians become citizens.

—*United States* v. *Nice,* 241 U. S. 591, 60 L. ed. 1192;
Tiger v. *Western Inv. Co., supra;*
United States v. *Sandoval, supra.*

Thus, nowhere do we find that any conservation rules and regulations of the Oklahoma Corporation Commission were designed to disturb or in any way could have affected

the supervision and control of the Secretary of the Interior and of the United States Geological Survey over these respondents' operations, or that they had any influence upon the relationship existing between respondents and the Government.

The relationship existing under the Departmental leases.

On page 3 of the reply brief petitioner says that respondents are as fully and completely regulated under a non-departmental lease as they are under a departmental lease. We emphatically deny this statement. So far as we know, no commercial oil and gas lease reserves to the lessor the full and complete supervision and control over the lessee's (Producer's) operations such as flows from Departmental leases and from Rules and Regulations of the Secretary of the Interior and of the Geological Survey, promulgated pursuant to provisions of the leases and to Acts of Congress. Aside from that, however, it is not what provisions might conceivably be incorporated in some hypothetical lease that determines the relative rights and obligations of these parties, but the terms and provisions of the leases themselves, the situations which have been created, and the decisions of this Court defining the relationship which resulted. Cases are not determined upon theoretical conditions which might have existed, but upon the facts disclosed by the record in each case.

The leases here involved specifically require the lessees to conform to the regulations of the Secretary of the Interior, *including those relating to conservation;* require them to observe many directions and regulations of the Supervisor of the Geological Survey, who may (among other detailed powers) *approve well-spacing programs.* (See The Texas Company's brief, pp. 13-15; Magnolia Petroleum

Company's brief, pp. 17-21.) That which still further and even more emphatically distinguishes these Departmental leases from the ordinary commercial oil and gas lease, however, and from the relationship thereby resulting is that such Departmental lessees are in fact conducting their operations for and on behalf of the Government, under its direct supervision and control, and that the Government is through such agency performing a governmental function devolving upon itself.

This Court has so emphatically and over such a long period of time held that an oil and gas lessee in the production of oil under a Departmental lease covering restricted Indian lands is an instrumentality of the Government, that this would no longer seem to be an open question. Such has been the holding as to Indian lands whether situated in Oklahoma or in other states. There can be no doubt about the correctness of that holding in principle.

The retention by the Government of the right to direct and control the details of the operations of lessee (the manner and means) shows that lessee is not an independent contractor but is an agency. This follows the familiar rule that where the contract provides for certain work to be done (even though it goes into great detail as to specifications), but where the control over the manner and means is left to the party contracting to do the work, such party is an independent contractor. But where there is reserved the right to supervise, direct and control the manner and means of doing the work, then the relationship is that of principal and agent or master and servant.

—*Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 33 L. ed. 440.

In 2 Amer. Juris., Agency, Sec. 8, it is said:

"*An independent contractor may be distinguished*

from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but only as to the result. A principal, on the other hand, has the right to control the conduct of an agent with respect to matters intrusted to him. The theory which in many cases is adopted to differentiate between an agent and an independent contractor is that one is to be regarded as an agent or an independent contractor according to whether he is subject to, or free from, the control of the employer with respect to the details of the work. Accordingly, the independence of the contract is negatived if it appears that the right of control was reserved by the employer; such independence is inferable where the evidence shows that the party entitled to exercise this right was the person employed, and not the employer.'"

It will be remembered that the leases in question do not stop with particularizing certain things to be done by lessee, but *the significant thing, and that which sharply differentiates them from ordinary commercial oil and gas leases, is the reservation to the departments of the Government of the power to direct and control the manner and means of doing the work.* Under this, the decisions of this Court are undoubtedly correct in holding that such a lessee, in the performance of duties and obligations devolving upon the Government, is a Federal instrumentality. This clearly distinguishes the situation here from those cases involving independent contractors cited by petitioner and which are discussed in our original briefs.

II.

The permissive Acts of Congress granting to States the power to impose taxes upon the production of oil, etc., from the lands of certain Indians relate to the lessee's operations and interest as well as to the royalty.

During the closing argument in response to a question which we believe was put by Mr. Chief Justice Vinson, counsel for petitioner said, in substance, that the Acts of Congress which gave consent to the imposition of taxes upon oil, gas and other minerals produced from the lands of certain particular Indians (but not others), had no effect upon the *lessee's* share of the oil, but simply permitted the state to tax the Indian's interest in the oil, theretofore untaxable. In other words, his answer was that these acts applied only to the *royalty* oil, and that it was not necessary to consent to the taxation of the lessee's operations. The same idea is advanced on page 13 of the reply brief. This also is a new contention by petitioner, not contained in its original brief, and is entirely without support either in the language of the acts themselves or of the decisions applying them.

Typical of such permissive acts is that relating to the production of oil from lands of the Five Civilized Tribes (45 Stat. at L. 496, and quoted on page 27 of The Texas Company's brief). We again call attention to pertinent passages as follows:

> "That all minerals, including oil and gas, produced * * * from restricted allotted lands of members of the Five Civilized Tribes * * * shall be subject to all state and federal taxes of every kind * * *."

The Act then authorizes the Secretary of the Interior to make payment of the taxes which may be levied against

the royalty interest from individual Indian funds held under his supervision.

Likewise, the Act of May 29, 1924, (43 Stat. at L. 244) and held by this Court to show the consent of the Congress to the imposition of the gross production tax of Montana to oil produced from Blackfeet Indian lands, provides:

> "That the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands * * *,"

and then continues with an authorization to the Secretary of the Interior to pay the taxes which might be assessed against the royalty interests.

This last Act was under consideration by this Court in *British-American Oil Producing Co. v. Board of Equalization*, 299 U. S. 159, 81 L. ed. 95, and the question there involved was whether the Congress had given its consent to the imposition of the tax upon the production of the oil *by the lessee.* (See p. 161 of opinion.) And in a number of other cases decided by this Court and cited in respondents' briefs the question was whether the *producer* of oil, gas or other minerals was subject to the tax in the absence of Congressional consent; and in each instance the answer being in the negative.

—*Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292;
I. T. I. O. Co. v. *Oklahoma*, 240 U. S. 522;
Oklahoma, ex rel., v. *Barnsdall Ref., Inc.*, 296 U. S. 521;
Howard v. *Gypsy Oil Co.*, 247 U. S. 503;
Large Oil Co. v. *Howard*, 248 U. S. 549;
Jaybird Mining Co. v. *Weir*, 271 U. S. 609.

In view of the above, we heard with amazement the

claim being made that these permissive Acts of Congress had no application to the lessee's operations or to the lessee's interest in the production. We believe that in every instance it has been the effect upon the lessee's operations, which has been the chief matter of inquiry, and so do not feel that this statement on behalf of petitioner should go unchallenged.

This causes us further to observe that it is absurd to assume that the Congress passed these various permissive Acts, that the Department of the Interior interpreted and applied them, and that the courts construed and enforced them over a period of many years, all as relating both to the lessee's production and to the royalty interest, if the consent Acts in fact were not a necessary prerequisite to the power of the states to impose the taxes upon the producer's operations! Such an assumption simply does not make sense.

III.

Respondents Are Not Tax Escapees.

Some inquiry was made at the oral argument concerning what taxes respondent might be subject to in their respective operations upon these leases, if the gross production and proration taxes do not apply. Of course the amount of taxes paid in connection with their operations and holdings elsewhere, as large taxpayers in the State is not involved here. But the only thing that would exempt the lessee under a producing oil and gas lease from the normal ad valorem tax upon all property used in and about the operations is the payment of the gross production tax on the oil and gas produced. Therefore, if respondents have, as they contend, a Constitutional immunity from the gross production tax, then they are subject to the normal ad valorem tax, which can

be enforced as to back years, since there is no statute of limitations which we know of applicable thereto. Under this, respondents can be taxed upon all their pipe lines (gathering lines, water lines, etc.), rigs, pumps, separators, storage tanks, casing in the hole, etc. These things sometimes run up into high figures. In addition, the oil itself after being run and put into storage is held to be subject to ad valorem taxes.

—*Taber* v. *I. T. I. O. Co.*, 300 U. S. 1.

Also, any gain resulting from the operations is subject to the state's income taxes.

—*Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376.

Thus it will be seen that these respondents are by no means tax escapees. They are subject to one form of taxes, or the other. But the fact that they may be subject to the other form of taxation does not prevent their claiming a Constitutional tax immunity from the gross production tax and the proration tax, if that immunity in fact exists.

IV.

There Is No Inconsistency in Respondents' Position in Opposing the Taxes in Question.

Again the petitioner, at the very conclusion of these cases steps completely outside the record and seeks to inject contentions not theretofore advanced. In the concluding argument of petitioner it was stated that the respondents paid the gross production taxes and proration taxes on the properties involved for a period prior to August, 1942, and May, 1941, respectively, and that they were inconsistent in protesting payments involved in this litigation. In the reply brief, page 11, petitioner in referring to this says that no

contention is made that the payment of the taxes for the period involved in these two suits "is any proof that they owe the taxes for which they here seek recovery", but claims that this should be considered in connection with respondents' argument that the legislature did not intend to impose a tax on the production of the oil in question. In an apparent effort further to emphasize this, petitioner attaches a statement dated November 22, 1948, (*after the hearing of these cases*), to the effect that respondents had for a time paid taxes without protest covering production from their restricted leases. Petitioner did not find it convenient to refer to the subsequent consistent payment of these taxes by respondents under protest.

These statements are dehors the record; no such contention was made in the court below; and respondents have not previously had any opportunity to meet this argument. It is improperly injected into the cases and should not be considered by the Court. Apart from that, however, these taxes are payable monthly, and the protests thereof stand upon a monthly basis, each month's protested taxes giving rise to a separate cause of action (see 68-1474 and 68-1475 O. S. A., quoted in our original briefs). Thus the fact that respondents may have failed to protest certain earlier taxes did not militate against their suing for the recovery of the taxes here involved.

Summary and Conclusion.

The remaining matters in the reply brief are discussed in our answer briefs, to which we respectfully refer the Court. In conclusion let us say:

1. That respondents are true Federal instrumentalities, both under the factual situation and under the unbroken line of decisions of this Court.

2. That in the absence of congressional consent, a state cannot impose a tax burden directly upon the functioning of such an instrumentality.

3. That although Congress under its plenary powers in Indian affairs has given such consent as to the production of oil from the lands of certain Indians, it has not seen fit to do so as to the Indian lands involved in these two cases.

4. That those decisions dealing with independent contractors instead of Federal instrumentalities are not controlling in the instant cases, but are clearly distinguishable therefrom.

5. That a tax upon *gain* resulting from the operation of a Federal instrumentality (income tax) is not a tax upon the operations (functioning) of the instrumentality, but is further removed, and therefore distinguishable therefrom.

6. That these respondents having undertaken and assumed the duties and burdens of Federal instrumentalities, are entitled to be protected in any constitutional rights and benefits flowing from the relationship thus created.

7. That where the Government is in fact performing

through its selected agency some essential governmental function (as in the administration of the affairs of its Indian wards), the doctrine of immunity from state burdens is a wholesome and necessary one, and should not lightly be cast aside.

Respondents therefore submit that the judgment of the Supreme Court of Oklahoma in these two cases is correct and should be affirmed.

Respectfully submitted,

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MOTION OF RESPONDENTS FOR PERMISSION TO FILE REJOINDER BRIEF.

Come now the respondents, The Texas Company and Magnolia Petroleum Company, and hereby show to the Court:

1. That during the closing argument of petitioner at the hearing of these two cases, and in the Reply Brief of petitioner filed since the argument, petitioner has injected certain new contentions into these cases, not thertofore presented either in the Supreme Court of Oklahoma or in the Original Brief of petitioner in this Court. That said new matter includes references to Rules and Regulations of the

Oklahoma Corporation Commission relating to oil and gas conservation, to well-spacing programs, and to former payment of gross production taxes by respondents; also questions of whether the consent Acts of Congress apply to the lessee under Departmental leases.

2. That respondents have been afforded no opportunity to answer these new contentions of petitioner, Oklahoma Tax Commission, and believe, and therefore so state, that the filing of their Rejoinder Brief herein would prove of assistance to the Court in the determination of these cases.

Wherefore, respondents pray the Court for permission to file their said Rejoinder Brief, tendered herewith.

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